

A Kurnia Insurans (M) Bhd v Clara Tan Saw Lan & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2-25-71 OF 1999
FAIZA TAMBY CHIK J
27 OCTOBER 1999

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Labour Law — Employment — Reinstatement — Awarded reinstatement — Failure to report for work — Claim that there was non-compliance of award — Whether amounts to a insubordination or a non-compliance of the award

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The applicant was ordered to reinstate the first respondent with payment for backwages and other benefits. On 5 February 1999 the applicant wrote to the first respondent to report to the applicant's premises on 9 February 1999 and to see the applicant's deponent. The first respondent replied on 8 February 1999 stating her refusal to do so as she claimed that the applicant had failed to comply with the award. The applicant, by a letter dated 24 February 1999, dismissed the first respondent. The first respondent made representations of non-compliance of the first award and the Industrial Court found that there was non-compliance of the award. The applicant applied for judicial review of the award.

D**E**

Held, allowing the application:

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- (1) Reinstatement invested the employer with all rights and remedies over the reinstated employee. Thus, an employee was bound to a lawful command of the employer (see p 498G-H).
- (2) The request made by the company by a letter dated 5 February 1999 was such a command and whether the respondent agreed or not, she ought to have attended. Her failure to attend and her reply were acts of insubordination (see p 499A).

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- (3) The respondent could contend that her second termination was wrongful but she had to do so in fresh proceedings. It could not be mounted in proceedings for alleged non-compliance of the first award (see p 499B).

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- (4) The second termination was a new event and thus outside the scope of the first award. It attracted a new recourse for redress. The first award was superseded or spent by the second termination (see p 499E).
- (5) By acting under the guise of non-compliance, the Industrial Court had acted ultra vires the Industrial Relations Act 1967 by acting without the reference from the minister (see p 499C-D).

[Bahasa Malaysia summary]

I

Pemohon telah diperintahkan untuk menempatkan semula responden pertama dengan pembayaran untuk gaji tertunggak dan manfaat-manfaat lain. Pada 5 Februari 1999 pemohon telah menulis kepada

responden pertama untuk melaporkan diri di premis pemohon pada 9 Februari 1999 dan untuk berjumpa dengan deponen pemohon. Responden pertama telah menjawab pada 8 Februari 1999 dengan menyatakan keengganan beliau untuk melakukan sedemikian, kerana beliau menuntut bahawa pemohon telah gagal untuk mematuhi award tersebut. Pemohon melalui surat bertarikh 24 Februari 1999 telah memberhentikan responden pertama. Responden pertama telah membuat representasi-represetansi mengenai ketidak-patuhan akan award pertama tersebut dan Mahkamah Dagang mendapati bahawa terdapat ketidak-patuhan akan award tersebut. Pemohon telah memohon kajian semula kehakiman akan award tersebut.

Diputuskan, membenarkan permohonan tersebut:

- (1) Penempatan semula memberikan majikan segala hak dan remedi ke atas pekerja yang ditempatkan semula. Oleh itu, seseorang pekerja terikat kepada arahan yang sah dari majikan (lihat ms 498G-H).
- (2) Permintaan yang dibuat oleh syarikat tersebut melalui surat bertarikh 5 Februari 1999 merupakan arahan yang sedemikian, dan sama ada responden bersetuju atau pun tidak beliau seharusnya telah menghadirkan diri. Kegagalan beliau untuk menghadirkan diri dan jawapan beliau adalah merupakan perbuatan ingkar perintah (lihat ms 499A).
- (3) Responden boleh menegaskan bahawa pemberhentian beliau yang kedua adalah salah tetapi beliau perlu melakukannya dalam prosiding yang baru. Beliau tidak boleh ditambah dalam prosiding untuk ketidak-patuhan akan award pertama yang didakwa (lihat ms 499B).
- (4) Pemberhentian kedua adalah satu peristiwa yang baru dan dengan itu adalah di luar bidang award pertama. Ianya membuka jalan keluar yang baru untuk menebus rugi. Award pertama telah menggantikan atau dihapuskan oleh pemberhentian kedua (lihat ms 499E).
- (5) Dengan bertindak secara kepura-puraan berhubung dengan ketidakpatuhan tersebut, Mahkamah Dagang telah bertindak ultra vires Akta Perhubungan Industri 1967 dengan bertindak tanpa rujukan daripada menteri (lihat ms 499C-D).]

Notes

For cases on reinstatement of employment, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 825-828.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

- A *Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors* [1974] 2 MLJ 41 (refd)
Menon v Brooklands (Selangor) Rubber Co Ltd, The [1968] 2 MLJ 186 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
- B *Overseas-Chinese Banking Corporation Ltd v National Union of Bank Employees & Anor* [1986] 1 MLJ 338 (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 (refd)
Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang [1996] 2 MLJ 697 (refd)
- C *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (refd)

Legislation referred to

- D Industrial Relations Act 1967 ss 20(1), 33B(1), 56(1)
Rules of the High Court 1980 O 32 r 13(1), O 38 r 2(3)

RR Sethu (John Fam and Kanawagi with him) (SN Fam & Co) for the applicant.

- E *P Kuppusamy (P Kuppusamy & Co)* for the respondent.

Faiza Tamby Chik J: This is an application by motion by the applicant, Kurnia Insurans (Malaysia) Bhd to quash the award of the Industrial Court made on 22 May 1999 pursuant to leave of the High Court granted on 8 July 1999. Briefly, the facts are as follows:

- F The first respondent was employed by the applicant. On 9 June 1995, the applicant terminated the first respondent's services (see encl 3, para 4 exh CAT-1 ('the first dismissal') at p 12). The Minister of Human Resources referred the first dismissal to the Industrial Court of Malaysia which was case No 4/4-329/1996 ('the first Industrial Court case') (see encl 3, para 5). The Industrial Court on 22 November 1997 handed down award no 56/97 ('the first award') in the first Industrial Court case directing the applicant to reinstate the first respondent to her former position within one month and to pay backwages and other benefits (See encl, 3 para 6 and exh CAT-2 ('the first award') (p14)). The application by the present applicant to quash the first award by way of judicial review was dismissed (see encl 3, para 3). Nothing arises out of the first award in the present originating motion. On 5 February 1999, the applicant, as employer, wrote to the first respondent to report at the applicant's premises on 9 February 1999 and to see the applicant's deponent at the latter's office (see encl 3, para 8 exh CAT-3 (p 30)).
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- I The first respondent, on 8 February 1999, ie a day before the date scheduled, wrote to the applicant who refused to report as requested by the applicant as the first respondent took the view that the applicant had not complied with the first award (see encl 3, para 10 exh CAT-4 (p32)). The first respondent did not report on 9 February 1999. On 24 February 1999,

the applicant, by a letter addressed to the first respondent, terminated the employment of the first respondent ('second termination') (see encl 3, para 13 exh CAT-5 (p34)). The first respondent, by a letter dated 3 March 1999, responded that she was wrongfully dismissed without just cause or excuse and would pursue the remedies open to her under the Industrial Relations Act ('the Act'). This is a clear reference to s 20(1) of the Act (as amended) (see encl 3, para 14 exh CAT-6). The first respondent thereafter made a complaint over the second termination to:

- (a) the Ministry of Labour under s 29(1) of the Act for wrongful dismissal and seeking reinstatement; (encl 3, para 16) and
- (b) the Industrial Court under s 56 of the Act for non-compliance for the first award (see encl 3, para 17 exh CAT-8 at p 41).

The applicant, in response, denied non-compliance of the first award (see encl 3, para 18 exh CAT-9 at pp 43-44).

The applicant, at the oral hearing, challenged the complaint of non-compliance and maintained that there was a new dismissal that had to take its course under the Act (see encl 3, para 20). The Industrial Court on 22 May 1999 handed down the second award and found non-compliance of the first award (see encl 3, para 21 exh CAT-11). The Department of Industrial Relations by a letter dated 23 June 1999, addressed to the parties, convened a conciliatory meeting on 30 July 1999 pursuant to the first respondent's complaint of wrongful dismissal arising out of the second termination (see encl 5, para 4 exh CAT-10).

The applicant challenged the second award. The applicant contended that the Industrial Court misunderstood and misapplied the relevant legal principles and despite the ouster clause found in s 33B(1) of the Act. This Court has jurisdiction to review and quash the award if the grounds contended for are made out. In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, the Court of Appeal held:

Held, dismissing the appeal:

(Per Gopal Sri Ram JCA) Parliament has attempted to exclude judicial review of the decisions of the court by providing in s 33B(1) of the Act that an award, decision or order of the court under the Act shall be final and conclusive. However, an inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or a purely administrative function, has no jurisdiction to commit an error of law, whether the error is jurisdictional or not. Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted.

... A judicial arbiter should not place an interpretation upon any Act of Parliament which has the effect of producing a result opposite to that intended by the collective will of the legislature, as gathered from the words of the Act and from such other sources as the law declares admissible. The Act is a piece of social legislation to promote industrial harmony, the interpretation of which should be liberal in order to achieve the object aimed at by Parliament.

A ... When Parliament enacted s 33(1) and (2) of the Act, it intended to meet two distinct situations that so often arise in the course of industrial adjudication. Section 33(1) of the Act deals with an interpretation of an award or an agreement, while s 33(2) of the Act is intended to cover a situation where a variation of an award or collective agreement is sought by one of the parties thereto.

B ... The court, faced with the respondent's application under s 33(1) of the Act, was under a statutory duty to interpret the first award and the two relevant articles in the collective agreement. Since the Act does not prescribe uncertainty or ambiguity as a condition precedent to the exercise of the jurisdiction in question, the court most certainly erred in construing s 33(1) of the Act. Further, by conducting a search for an ambiguity and uncertainly in the first award, the court took into account an irrelevant consideration and asked itself the wrong question when undertaking the decision-making process. It was thus quite clear that the court made an error of law in the second award.

C ... Accordingly, the second award was invalid and was liable to be quashed by certiorari. The court having failed to perform its duty under s 33(1) of the Act, it was right that the High Court remitted the matter to the court with a direction that it considered the respondent's application according to law.

D In *Syarikat Berkerjasama-Sama Serbaguna Sungei Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697, the Federal Court held:

E (7) The Privy Council case of *South East Asia Fire Bricks Sdn Bhd, v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1981] AC 363 maintains the distinction between an error of law on the face of the record and an error of jurisdiction. The Privy Council refused to follow the opinion of Lord Denning in *Pearlman v Keepers & Governors of Harrow School* [1979] QB 56 that the distinction between errors of law within jurisdiction and without jurisdiction should be discarded. The court held that Lord Denning's view in *Pearlman* is to be preferred to that of the Privy Council in the *Fire Bricks* case, which should no longer be considered good law. To hold otherwise would mean that a tribunal could misinterpret the law without worrying about interference, and the tribunal would become the final judge of the law, thereby violating the constitutional principle that it is the High Court which determines the meaning of legislation and not any other entity. Therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause of the 'not to be challenged, etc' kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and inferior courts (see pp 42H-I and 45F-I); *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Product Manufacturing Employees Union & Ors* [1981] AC 363 not followed; *Pearlman v Keepers & Governors of Harrow School* [1979] QB 56 followed.

H The effect of the order for reinstatement was to restore the relationship of master and servant, ie that the first respondent was and continued to be the employee of the applicant.

I In *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 at p 151, Abdooldader J said:

In view of the case of the appellant's dismissal pending before the Industrial Court which has jurisdiction to make an award, inter alia, or reinstatement or re-employment, the circumstances would, in my view, be exceptional within the principle and *raison d'être* of *Hill* and a refusal of the interlocutory injunction sought by the respondents would be justified on that score alone, although this would in effect be tantamount to treating the relationship of master and servant, although terminated, as still subsisting and thus appear to breach the general rule.

Ayadurai Industrial Relations — Law & Practice (2nd Ed) at p 183 said:

The Industrial Court has clarified what 'reinstatement' means and has indicated how 're-employment' differs from reinstatement. In *Han Chiang High School & Anor v National Union of Teachers in Independent Schools* (Award 330 of 1990) the court stated:

The law is clear on the issue of reinstatement:

'Reinstatement requires the employer to treat the employee as if he had never been dismissed, thus restoring all pension, pay, holiday and seniority rights, and arrears of pay must be made to the employee' (*Employment Protection*) *Jowitt's Dictionary of English Law* (second cumulative supplement to the 2nd Ed at p 140).'

Furthermore:

'The effect of an award of reinstatement is merely to set at naught the order of wrongful dismissal of a workman by the employer and to reinstate him in the service of the employer and to restore him to his former position and status as if the contract of employment originally entered into has been continuing.' *Malhotra Law of Industrial Disputes* (Vol 2, 4th Ed at p 934).'

Then, in *Rang Xerox Ltd v Chng Siw Sin* (Award 119 of 1990):

The general rule in industrial adjudication is that when a workman is reinstated, then, in the absence of cogent reasons, the workman should be entitled to the full wages or remuneration which he would have received had he continued in service. The effect of reinstatement is that the workman is restored to his former position insofar as his capacity, status, and emoluments are concerned. The workman is restored to his former position and status, setting aside his discharge or dismissal from service as if it never had occurred, and he gets all the benefits of continuity of service.'

Reinstatement therefore invests the employer with all rights over the reinstated employee, including the power of disciplinary action (including dismissal) for any fresh misconduct. An employee is bound to obey a lawful command of an employer, and failure to do so is misconduct that justifies summary dismissal.

In *Menon v Brooklands (Selangor) Rubber Co Ltd, The* [1968] 2 MLJ 186, the Federal Court held:

In this case, the contumelious manner in which the appellant refused to obey instructions to see the manager of the estate went beyond a mere isolated act of disobedience of a lawful order. It challenged and rejected the whole fabric of the relationship of employer and employee and effectively destroyed the trust which must subsist in any such relationship where the employee holds a responsible position. The appeal was therefore dismissed.

- A** The request made to the first respondent by the letter dated 5 February 1999 (exh CAT-3) was such a lawful command. The first respondent, whether she agreed with the request or not, ought to have attended. Her failure to do so and her reply (exh CAT-4) was clear insubordination. This was a fresh event subsequent to the first award. The first respondent could contend that the second termination was wrongful, but she had to do so in
- B** fresh proceedings under s 20(1) of the Act. This challenge cannot be mounted in proceedings for the alleged non-compliance of the first award under s 56(1) of the Act. The second termination was a new event that gave rise to a new termination, the second termination. Hence, it was not part of and thus outside the scope of the first award.
- C** A new legal regime had replaced the state of affairs created by the first award and hence it was a new termination that attracted a new recourse for redress under the Act. Therefore, a new remedy for a new dismissal founded on misconduct after the first award cannot be given by a different authority (ie the Industrial Court) under the guise of non-compliance of the first award given for a dismissal that arose from a different misconduct. By
- D** doing so, the Industrial Court had acted ultra vires the Act by usurping the powers of the minister and without reference from the minister, whose reference was the source of the jurisdiction of the Industrial Court for a claim of wrongful dismissal for a workman under s 20 of the Act. The legality or otherwise of the second termination was a matter for separate and
- E** independent proceedings following upon the complaint made by the first respondent. The first award so far as it concerned the reinstatement had been superseded or spent by the second termination.

In *Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors* [1974] 2 MLJ 41:

- F** The respondents, employees of the applicants, had absented themselves from work and gone on strike in protest against the dismissal of two of their colleagues. They were subsequently dismissed by the applicants. The matter was referred to the Industrial Court, which held that the dismissal of the two workers by the management was inequitable and without just cause or excuse, that there was no lockout by the management and that there was a strike but it was a legal strike. The Industrial Court ordered the workers to be reinstated.
- G** On the motion for a certiorari, it was argued that the record of the proceedings of the Industrial Court contained two errors on the face of the record, that is: (1) in finding that the dismissal of the workers by the applicant was improper or unjustified; (2) in not finding that the workers themselves terminated their services having broken their contract of service by going on strike and continuously absenting themselves from work for more than two days
- H** Held:
- (1) In the light of ss 13 and 15 of the Employment Ordinance, it would seem clear that a worker who continuously absents himself from work for more than two days without reasonable excuse commits a wilful breach of the contract of service for which the employer may terminate his service without notice.
- I** (2) In this case, the Industrial Court failed to consider whether the workers did continuously absent themselves in circumstances falling within s 15(2) of the Employment Ordinance.

- (3) As the matter in dispute in this case fell within sub-s (3) of s 12 of the Industrial Relations Act 1967, the strike was illegal. The Industrial Court erred in law in finding that the strike was legal. **A**
- (4) Since there were errors on the face of the record, the decision of the Industrial Court should be quashed.

It is to be noted that *Syarikat Kenderaan Melaya Kelantan* stated that: **B**

... *Lian Yit Engineering Works* [1974] 2 MLJ 41, though disapproved of or overruled by the board, must now be taken to have always correctly stated the law.

Upon a reinstatement, even the rights of an employer to transfer the reinstated employee continues to exist. In *Oversea-Chinese Banking Corporation Ltd v National Union of Bank Employees & Anor* [1986] 1 MLJ 338, there was: **C**

.... an application for an order of certiorari to quash an award of the Industrial Court ordering the applicant to reinstate its employee, Wong Lee Sim ('Wong') to his former post of book keeper or to any recognized post established for a special grade clerk. **D**

Held, allowing the bank's application:

- (1) The court fell into the error of asking itself the wrong question by an overemphasis on the aftermath of the transfer. It was said that Wong had been transferred to an inferior post. In doing so, the Court overlooked the fact that the posting to the credit administration department was itself an interim measure and had to be carried out at short notice pending the outcome of the inquiry. **E**
- (2) The court fell into the error of asking itself the wrong question by an overemphasis on the aftermath of the transfer. It was said that Wong had been transferred to an inferior post. In doing so, the Court overlooked the fact that the posting to the credit administration department was itself an interim measure and had to be carried out at short notice pending the outcome of the inquiry. **F**
- (2) The order of reinstatement itself is superfluous because Wong had never lost his job as a special grade clerk in the bank.
- (3) The order of reinstatement as book keeper was contrary to art 16(1) of Award 117/82 as it deprived the bank of its right to transfer its employees at its sole discretion. **G**

In the instant case, the first respondent herself had elected and accepted the applicant's letter dated 24 February 99 (exh CAT-5) as dismissal without just cause or excuse and made a complaint to the director of industrial relations under s 20 of the Act. The director had entertained the complaint as one of wrongful dismissal. Therefore, it is clear that the first respondent could not and ought not to have complained of non-compliance of the first award. The first respondent was estopped from doing so. The first respondent had unequivocally and unambiguously taken a stand on the second termination as a dismissal. **H**

In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, the Federal Court held: **I**

- A** (1) ...
- (2) The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.
- B**
- (3) ...
- (4) ...
- C** (5) Even though estoppel was not pleaded as required under O 18 rr 7(l) and 8(1) of the Rules of the High Court 1980, the material facts giving rise to the estoppel were sufficiently pleaded without actually using the term 'estoppel'. Furthermore, considerable evidence on the point was led at the trial by the respondent without objection from the appellant.
- D** (6) A court may permit a litigant to argue an unpleaded estoppel if it is in the interests of justice to do so. It is a matter within the discretion of the judge who must have due regard to all the circumstances of the case, including any prejudice that may be caused by the affected party being taken by surprise. Nevertheless, such departures should rarely be permitted, for otherwise, the rule that a party is bound by its pleadings will be rendered meaningless.

E Further, the alleged non-compliance of the order for reinstatement has become academic by reason of the second termination. The Industrial Court in its second award did not consider these aspects

Another point is that the respondent has not, up to date (ie 27 October 1999) filed an affidavit in opposition to the substantive motion. In the absence of such an affidavit, the respondent is deemed to admit the averments of the applicant. See *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 288. It is observed that the affidavit filed in support of the respondent's motion to strike out cannot be read because it was filed to support that motion and nothing. Further, no notice was given by the respondent that she intends to use that affidavit to oppose the substantive motion. Though there is a provision in O 32 r 13(1) of the Rules of the High Court 1980 ('RHC') for notice in relation to summons, there is no such rule for motions. Order 38 r 2(3) RHC provides for use of affidavits in proceedings commenced by originating motions. The respondent claimed that she made the complaint of wrongful dismissal arising out of the second termination under s 20 of the Act without prejudice to her rights. First, the respondent had not produced any letter of complaint. Secondly, there can be no such reservation when invoking the jurisdiction of a tribunal. She was bound by that complaint and its legal consequences. Thirdly, this is a proper case of termination and hence the procedure under s 20 of the Act and not non-compliance of the first award, so far as it is related to reinstatement.

I What is also important is that one cannot have the best of both worlds. In fact, there can be no question of without prejudice because the

respondent made a complaint of non-compliance and then made the complaint of wrongful dismissal. The first respondent's conduct in making the complaint under s 20(1) of the Act on the second termination was an unequivocal and unambiguous act. By this complaint, the statutory jurisdictions under s 20(1) of the Act is invoked. One cannot invoke a statutory jurisdiction on a without prejudice basis. By making the complaint under s 20(1) of the Act, the first respondent had accepted that the second termination was a wrongful dismissal, and hence was estopped from contending otherwise.

For these reasons, I am of the view that the notice of originating motion dated 15 July 1999 in encl 6 should be allowed, and the applicant be granted an order of certiorari to quash Industrial Court Award No 252 of 1999, dated 22 May 1999 and costs.

Application allowed.

Reported by Andrew Christopher Simon

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